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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 309

CURTIS TAYLOR,

Petitioner,

v.

THE BALTIMORE & OHIO RAILROAD CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Curtis Taylor, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on April 2, 1965.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reported at 344 F. 2d 281.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on April 2, 1965, and copies thereof are appended to this petition in the appendix at volume II, 48a-49a. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

The crucial issue in this action, brought under the Federal Employers' Liability Act, was where this accident occurred. If it occurred on the gangplank, it would be considered to have occurred "upon the navigable waters" and, therefore, within the purview of the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. Sec. 930). Thus, no remedy would be available under the Federal Employers' Liability Act and plaintiff's suit would fail.

A crucial part of the defendant's proof on this issue consisted of a report prepared by an employee of the defendant railroad, and sent to the Department of Labor, pursuant to the provisions of the Longshoremen's Act (33 U. S. C. Sec. 930) for the purposes of identifying accidents covered under that Act. In effect, this report indicated that the accident occurred on the gangplank. The questions presented are:

(1) Whether it was prejudicial error to admit into evidence the defendant railroad's report to the Department of Labor, since this report does not fall within the business record exception found in the Federal Business Records Act (28 U. S. C. § 1732).

(2) Whether it was prejudicial error to admit into evidence the defendant railroad's report to the Department of Labor, since its admission is expressly forbidden under the provisions of the Longshoremen's Act (33 U. S. C. Sec. 930).

Statutes Involved

33 U. S. C. Sec. 930, The Longshoremen's Act, provides, in pertinent part, as follows:

"(a) Within ten days from the date of any injury or death or from the date that the employer has

knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address and business of the employer; (2) the name, address and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

* * * * * *

(c) Any report provided for in subdivision (a) or (b) of this section shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made."

Statement

The plaintiff, an employee of The Baltimore and Ohio Railroad Co., was injured while operating a tractor on pier 66, North River, New York, on the night of December 24, 1956. Suit was brought under the Federal Employers' Liability Act. The case was tried in the Eastern District of New York before District Court Judge Rosling and a jury. The jury returned a verdict for the defendant and a judgment was entered upon that verdict on February 20, 1963.

It was conceded at trial that, if the plaintiff's accident was covered by the Longshoremen's & Harbor Workers' Compensation Act, no remedy would be available under the Federal Employers' Liability Act and the plaintiff's suit must fail. It was also virtually conceded at trial that, if the accident of which the plaintiff complained occurred on a gangplank, it would be considered to have occurred "upon navigable waters" and, therefore, within the purview of the Longshoremen's Act.

In this posture of the case therefore, the critical issue at trial was where the accident occurred. And, in fact the trial judge charged that this issue was of "decisive significance" (25a) and, when the jury returned its verdict, it plainly indicated that it was based on having found "the plaintiff to have been on the gangplank" (62a).

The defendant's proof on the issue of where the accident happened consisted of a report made under the provisions of the Longshoremen's Act to the Secretary of Labor. This report of the accident which was introduced into evidence is entitled "U. S. Dept. of Labor, Bureau of Employees Compensation of the State of New York." (See Defendant's Exhibits EE & CC.*) The report was originally made by the defendant railroad and filed with the United States Department of Labor (113a). It is required to be made under the provisions of the Longshoremen's Act (28 U. S. C. Sec 930) for the purposes of identifying accidents covered under that Act (104a).

33 U. S. C. Sec. 930, The Longshoremen's Act, provides, in pertinent part, as follows:

> "(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address and business of the employer; (2) the name, address and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.
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> * * * * * *

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* CC is merely a carbon copy of EE (113a).

> (c) Any report provided for in subdivision (a) or (b) of this section shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made."

The Labor Department report in question contains the following description of the accident here at issue:

> "While Taylor was pulling a line of 6 empty trailer trucks up the plank onto float No. 1830 on the north side of Pier 66, North River, his tractor stalled halfway up."

The man who signed the report, Mr. Getty, was not produced at trial and, as the trial judge indicated in his charge, "what (Getty) knew about the content of this form, where he got the information from, the source, and so on, is not stated" (34a). The trial judge, nevertheless, admitted the form over the plaintiff's objection (131a) irrespective of the fact that the statute itself specifically excluded it from admission into evidence.

The decisive and highly prejudicial effect of this report on the jury was recognized by the trial judge. Responding to the plaintiff's motion to set aside the verdict, the trial judge indicated that the jury had, in effect, brought in a "special finding" that the accident occurred on the gangplank (135a). Furthermore, the trial judge indicated, the jury's request for exhibits also showed that the location of the accident was decisive to their verdict (135a).

It is also significant on the issue of prejudice to the plaintiff that the trial judge said (136a):

> "And the tragic part of it, in the Court's view, is that so far as negligence was concerned in this case, it was practically conceded by the defense when they put the operator of the tractor on, which was involved in the collision, and he confirmed the plaintiff's ver-

sion as to the accident itself, but the jury never reached a consideration of that."

The Court of Appeals affirmed the decision below, and thus created a situation which makes this case a peculiarly appropriate one for this Court to review by way of Writ of Certiorari.

Reasons for Granting the Writ

(1) The decision below should be reviewed because the Court of Appeals for the Second Circuit has misconstrued, misapplied and unduly restricted this Court's decision in *Palmer* v. *Hoffman* (318 U. S. 109), in such a way as not only to destroy the spirit in which it was advanced, but also to create a direct conflict with the decisions of the Court of Appeals in the Sixth and Ninth Circuits.

Slowly but surely the Second Circuit has distinguished and chiseled out exceptions to the *Palmer* decision, and while some of these may be wholly justifiable and in accord with its spirit, the Court no longer remembers, the pre-chiseled *Palmer,* or what it stood for, and in this vein it is of utmost importance, that this Court reassert the principles for which *Palmer* stands.

The reassertion is needed so as to once again establish uniformity between the decisions of the various circuits, as well as to establish guideposts to a problem that arises with great frequency in the trial courts of this country.

Very often the simplest propositions are the most easily misconstrued. In *Palmer,* this Court very simply and ably established that the statutory exception embodied in the Federal Business Records Act (28 U. S. C. § 1732) only applied to "records essential to (a business') efficient operation" (at p. 111) and that the railroad's record of how the accident happened, which was sought to be introduced, was "not for the systematic conduct of the enterprise as a railroad business" (at p. 114).

The motivation behind this holding undoubtedly concerns itself with the reliability of the information recorded. The Court feared that "regularity of preparation would become the test rather than the character of the records and their earmarks of reliability . . ." (at p. 114).

Various exceptions to the *Palmer* holding, based on circumstances evidencing a certain reliability to be attributed to the report in question, have been created by the Second Circuit. In *United States* v. *New York Foreign Trade Zone Operators* (304 F. 2d 792, 796), the accident report was admitted into evidence because it was not prepared for litigation but for the purpose of verifying the employee's workmen's compensation claim against the Government. And, in *Pekelis* v. *Transcontinental & Western Air, Inc.* (187 F. 2d 122), the accident report was admitted into evidence because it was against the interest of the entrant when made," and it was "not the entrant who . . . sought to introduce the reports" (at p. 130).

These earmarks of reliability are most certainly not present in the instant case. The report here, just like the report in *Palmer,* served the interest of the entrant when made, and unlike *Pekelis,* it is the entrant here who seeks to admit the reports. Furthermore, it is distinguishable from the *Foreign Trade Zone* case in that the report was here made for the purpose of future litigation.

The report in the instant case, lacking all earmarks of reliability, cried out for the simple application of the *Palmer* doctrine, and failing to do so, the Second Circuit, in addition to its misapplication of this Court's decision, brought the case into conflict with the recent decision of the Sixth Circuit in *Dilley* v. *Chesapeake & Ohio Railway Company* (327 F. 2d 249, 251 (6th Cir. 1964)). There, the Court applied a literal interpretation of the *Palmer* doctrine in holding inadmissible a company form accident report sought to be introduced by the plaintiff, whom the contents of the report favored. Even though the report was against the

interest of the entrant when made, the Court held it inadmissible simply because it was not in the regular course of the railroad's business to prepare accident reports.

Such a holding is not only in conflict with the decision in the instant case, but directly in opposition to the Second Circuit decision in the *Pekelis* case where the admissibility was based on the fact that the report was against the interest of the entrant when made and therefore achieved some measure of reliability that brought it within the business records exception.

There is yet a further area of conflict with decisions of other circuits. In your petitioner's brief, it was forcefully argued that another reason for excluding the report and for refusing to allow it to come in under the business record exception was that there was no indication that the information on which the report was founded was given in the regular course of business. (See, e.g., *United States* v. *Grayson,* 166 F. 2d 863, 868-869; *Shenker* v. *United States,* 322 F. 2d 622, 627.) In both the *Grayson* and *Shenker* cases, the Second Circuit excluded business records on the ground that the information contained in them came from persons who were not under a duty, in the regular course of business, to give such information.

In *Grayson,* Judge Learned Hand, writing for the court, said (166 F. 2d at p. 869):

> "In cases where an entrant records what he has heard, the document will be evidence of what they have told him only in case it appears that it was part of their regular course of business to report to him what the declarants themselves knew, and it was part of his business to record what they said. The statute did not mean to make competent whatever the entrant picked up from random sources, although it was part of his business to pick up information where and when he could and make a record of it. The 'act, transaction,

> occurrence or event' which the entrant records must be one of which he learns from a declarant who shall 'in the course of business transmit the information for inclusion in the memorandum.' 'Multiple hearsay' is no more competent now than single hearsay was before."

This same reasoning was also followed in the 1963 *Shenker* case before the Second Circuit. (See 322 F. 2d 622, 627, *supra*.) Furthermore, in the 1962 case of the *United States* v. *New York Foreign Trade Zone Operators* (304 F. 2d 792, 796), the Court expressly made note of the fact that "the entrant and the informants were under a duty to make the report," intimating that, had this not been so, the report would have been inadmissible.

The Court of Appeals in the instant case made no reference to this argument in its opinion and, therefore, it must be assumed that it was rejected *sub-silentio*. Such a rejection not only brings it in conflict with its own prior decisions, heretofore alluded to, but with the decision of the Ninth Circuit in *Standard Oil Co. of California* v. *Moore*, 251 F. 2d 188, where the court, in holding inadmissible certain reports, curiously enough, relied on the Second Circuit's decision in the *Grayson* case. The Court stated that "where the information comes to the entrant or maker from unauthorized persons, the memorandum or record is therefore inadmissible, not because it contains hearsay, but because it was not made in the regular course of business" (at p. 214). The reports were held inadmissible because "in few, if any, of these instances was any showing made that the person supplying such information to the writer was under a duty to do so.

In the instant case, the entrant was not produced and there was absolutely no indication as to where, or from whom, he obtained the information embodied in the report. The case is, therefore, in perfect apposition to the *Standard Oil* case.

The questions presented by this case are of great and recurring significance in light of the conflicts they create and the numerous instances in which they arise, and thus, after 22 years, when the inner workings of *Palmer* are beginning to rust, this case becomes a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

(2) The decision below should be reviewed because of the serious question involved in connection with the refusal of the Courts below to apply the exclusionary provision found in the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. Sec. 930(c)).

The report of accident introduced in this case was made under the provisions of 33 U. S. C. Sec. 930, set out verbatim, *infra*.

In short, the very Longshoremen's Act which required the defendant railroad to submit the report of accident, whose admissibility is in issue in this case, forbids its admission.

In *Palmer* v. *Hoffman*, this Court alluded to two statutes which have a provision similar to that found in Section 930(c) of the Longshoremen's Act. (See 318 U. S., at pp. 114-115.) Common carriers are required to file monthly reports of railroad accidents with the I. C. C. (See 45 U. S. C. Sec. 40), but the statute prohibits the admission of such reports in litigation arising out of the accidents. (See 45 U. S. C. Sec. 40.) A similar provision bars the use in litigation of reports concerning accidents resulting from the failure of a locomotive boiler. (See 45 U. S. C. Secs. 32, 33.) The Court characterized the two statutes as evidencing "an explicit congressional policy to rule out reports of accident . . ." (318 U. S. at p. 115) and implied that the policy is founded on the fact that the reports are unreliable because they are prepared with future litigation lurking in the background.

A second reason of policy behind the exclusionary provision of the Longshoremen's Act is the prejudicial effect on the jury of knowledge that the plaintiff, if denied common law recovery, will be awarded compensation payments. (Compare, *Eichel* v. *New York Central Railroad Co.*, 84 S. Ct. 316.) The likely prejudice and the difficulty of avoiding it which explain the exclusionary provision of Section 930 were well illustrated in the instant case, as a result of the Judge's charge on the statute.

The Congressional intent found in the Longshoremen's Act is clear and unambiguous. It is merely a legislative embodiment of the principles for which *Palmer* v. *Hoffman* stand. In short, Congress did not want these accident reports, which are subject to a great deal of unreliability to be admitted into evidence for any purpose whatsoever.

This Congressional intent has been thwarted in the instant case under the guise of holding that because plaintiff's counsel did not specifically object on the statutory ground, the Court was powerless to exclude the statement. Counsel for the plaintiff did, however, object on other specified grounds.

It has long been settled that a ". . . (specific) objection overruled will be effective, though naming an untenable ground, if there is *no purpose at all* for which the evidence could have been admissible." (1 *Wigmore, Evidence* § 18 at p. 342; cf. *Richardson on Evidence* (9th Ed.), Section 543, p. 561; *Presnell* v. *Garrison*, 121 N. C. 366, 28 S. E. 409.)

Certainly, the exclusionary provision of the Longshoremen's Act makes the report in the instant case inadmissible for any purpose whatsoever in judicial proceedings.

It is respectfully submitted that this Court should exercise its inherent power to see that Congressional Acts involving important public policy considerations are not denied application in appropriate cases.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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